IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: APPLE & AT & TM ANTI-TRUST LITIGATION.	C-07-5152 FEBRUARY 9, 2009 PAGES 1 - 35

THE PROCEEDINGS WERE HELD BEFORE

THE HONORABLE UNITED STATES DISTRICT

JUDGE JAMES WARE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ
BY: MARK C. RIFKIN
270 MADISON AVENUE
NEW YORK, NEW YORK 90016

FOR THE DEFENDANTS: LATHAM & WATKINS
BY: ALFRED C. PFEIFFER, JR.
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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANTS:

CROWELL & MORING
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SAN JOSE, CALIFORNIA FEBRUARY 9, 2009

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER 07-05152, IN RE APPLE AND AT & TM ANTITRUST LITIGATION.

ON FOR APPLE'S MOTION FOR CERTIFICATE OF APPEALABILITY OF LIMITED PORTIONS.

TEN MINUTES EACH SIDE.

COUNSEL, COME FORWARD AND STATE YOUR APPEARANCES.

MR. PFEIFFER: GOOD MORNING, YOUR HONOR. AL PFEIFFER AND SADIK HUSENY OF LATHAM & WATKINS ON BEHALF OF APPLE.

MR. RIFKIN: AND GOOD MORNING, YOUR HONOR. MARK RIFKIN ON BEHALF OF WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ ON BEHALF OF PLAINTIFFS.

THE COURT: THERE WERE MULTIPLE MATTERS BEFORE THE COURT, BUT I HAD MY STAFF NOTIFY YOU, AND I HOPE YOU GOT THE WORD, THAT WHAT I WANTED TO HEAR IS THE MOTION HAVING TO DO WITH THE REQUEST FOR CERTIFICATION OF A PORTION OF THE ORDER FOR INTERLOCUTORY APPEAL.

AND THERE ARE TWO ASPECTS TO THAT THAT I WOULD HAVE YOU ADDRESS IN ORAL ARGUMENT.

FIRST OF ALL, IT DID NOT OCCUR TO ME TO FRAME THE ISSUES FOR APPEAL. RATHER, IT WOULD HAVE BEEN MY UNDERSTANDING THAT THE ISSUE FOR APPEAL IS PURELY THE ORDER DENYING THE MOTION TO DISMISS AND MY ORDER AND THE REASONS FOR MY ORDER WOULD FRAME THE ISSUE, AND THAT I WOULD NOT REFRAME THE ISSUES AS STATED.

INDEED AS I READ THE ISSUES AS STATED, IT REMINDS ME OF THE OLD SAYING I MAY NOT HAVE ALL OF THE VOTES AT THE MEETING, BUT IF I GET TO SET THE AGENDA, I CAN INFLUENCE THE OUTCOME.

AND SO BY FRAMING THE ISSUE IN A WAY THAT IT IS FRAMED HERE, IT SEEMS AS THOUGH IT SUGGESTS AN OUTCOME AND A BASIS OF THE OUTCOME THAT IN MY VIEW MAY BE DIFFERENT THAN WHAT WAS STATED IN THE ORDER.

SO I WOULDN'T INTEND TO -- I WOULDN'T INTEND TO, IF I GRANT THE MOTION, INDICATE THAT I AGREE THAT THESE ARE THE APPROPRIATE ISSUES FOR INTERLOCUTORY APPEAL?

AND THEN THE SECOND ISSUE THAT I WOULD WISH THE PARTIES TO ADDRESS IS WHAT WOULD BECOME OF THE UNDERLYING CASE IF I WERE TO ALLOW THIS INTERLOCUTORY APPEAL.

DO YOU WANT TO SPEAK TO THOSE?

MR. PFEIFFER: YES, YOUR HONOR, THANK YOU.

LET ME START WITH THE FIRST POINT, WHICH IS I GUESS THOSE WHO WRITE THE HISTORY BOOKS CONTROL.

WE OBVIOUSLY HAD NO INTENT OTHER THAN TO SPECIFY THAT WE WERE LOOKING AT LIMITED ISSUES WITHIN THE COURT'S ORDER.

WE HAVE NO OBJECTION TO, IF YOUR HONOR DECIDES THAT THESE ARE APPEALABLE ISSUES THAT SHOULD BE CERTIFIED FOR APPEAL NOW, HOWEVER YOUR HONOR WANTS TO FRAME IT FOR THE COURT IS OBVIOUSLY YOUR HONOR'S DISCRETION. AND WE HAVE NO PROBLEM WITH WHAT YOU'RE PROPOSING OBVIOUSLY.

THE COURT: I GUESS THE QUESTION IS DO I NEED TO REFRAME THE ISSUES?

I DENIED A MOTION AND IN DENYING THE MOTION I ISSUED AN ORDER.

IS IT YOUR UNDERSTANDING THAT UNDER THE CERTIFICATION PROCESS, I NEED TO DO ANYTHING MORE THAN SAY, "I CERTIFY THAT THERE IS A DISPUTE THAT COULD AFFECT THE CASE, THAT LANGUAGE THAT IS IN THE STATUTE AND THE RULE," AND THEN ALLOW THE PARTIES TO ARGUE WHY AND WHAT -- HOW THEY FRAME THE ISSUES WILL BE UP TO THEM.

MR. PFEIFFER: I THINK THAT'S RIGHT, YOUR HONOR. ULTIMATELY WE, THE PARTIES, WOULD HAVE TO FOCUS THE NINTH CIRCUIT IF YOU DID CERTIFY AND SEND IT UP TO THEM, WE WOULD HAVE OUR NEXT ROUND OF BRIEFING OF WHETHER THEY DECIDED TO TAKE THE APPEAL OR NOT.

WE WOULD STILL FOCUS ON THE SPECIFIC ISSUES THAT WE THINK ARE IN DISPUTE THAT MERIT INTERLOCUTORY REVIEW.

SO THAT'S WHY WE FRAME THEM SPECIFICALLY.

OUR INTERPRETATION OF 1292(B) WHEN IT DOES TALK ABOUT CONTROLLING QUESTIONS OF LAW WAS THAT IT WOULD BE SUBSIDIARY ISSUES AND NOT THE ULTIMATE RULING THAT THE APPEAL IS TAKEN FROM.

BUT I DON'T THINK IT CHANGES. IF THE ORDER ITSELF WAS CERTIFIED FOR INTERLOCUTORY APPEAL, THE PARTIES WOULD STILL THEN BE ABLE TO BRIEF THE INDIVIDUAL ISSUES THAT WE THINK FRAME THIS DISPUTE.

THE COURT: WELL, HERE'S WHAT IS TROUBLING: IF THIS IS HOW YOU FRAME THE ISSUES, IT SEEMS TO ME THAT IT SUGGESTS TO ME THAT THIS IS HOW YOU WOULD SUPPORT YOUR RIGHT TO TAKE THIS INTERLOCUTORY APPEAL.

SO IF I DISAGREED WITH THE WAY YOU FRAME

THE ISSUE, PERHAPS I SHOULD DISAGREE WITH THE NEED FOR AN INTERLOCUTORY APPEAL.

IT DOESN'T SEEM TO ME THAT THE LANGUAGE, WHETHER NEWCAL FUNDAMENTALLY ALTERED ANTITRUST LAW TO HOLD THAT IT AFTERMARKET POWERS ADEQUATELY ALLEGED AND MONOPOLIZATIONS CLAIM CAN THUS PROCEED SIMPLY WHERE IT IS ALLEGED THAT A PLAINTIFF DID NOT KNOWINGLY AND INTENTIONALLY PLACE THE DEFENDANT IN A MONOPOLY POSITION.

THAT TENDS TO TRY AND PUT DOWN ON A PINPOINT SOMETHING THAT IS PERHAPS FAR MORE COMPLEX THAN THAT AND WHICH LED THE COURT TO ITS DECISION.

WHETHER A PRODUCT SUCH AS A CELLULAR VOICE AND DATA SERVICES THAT INDISPUTABLY EXISTED LONG BEFORE AN INDEPENDENT OF A FOREMARKET PRODUCT CAN BE CONSIDERED WHOLLY DERIVATIVE FROM AND DEPENDENT ON THAT FOREMARKET PRODUCT AS REQUIRED UNDER ICON TO SUPPORT COGNIZABLE RELEVANT MARKET.

WHETHER A COMPANY'S INITIAL ENTRY STRATEGY INTO A HIGHLY COMPETITIVE PRIMARY MARKET CAN GIVE IMMEDIATE RISE TO COGNIZABLE MONOPOLY CLAIMS AGAINST THAT COMPANY IN AN AFTERMARKET LIMITED TO THAT COMPANY'S NEWLY LAUNCHED PRODUCT.

I CAN TELL YOU THAT IF YOU WERE TO GO TO THE COURT OF APPEALS WITH THESE AS YOUR ISSUES AND

IN MY VIEW MEASURE THOSE UP AGAINST THE ANALYSIS DONE BY THE COURT, IT WOULD SEEM TO BE THAT THERE'S A DISCONNECT.

SO WHAT I NEED TO BE CONVINCED IS THAT YOU'RE WILLING TO ACCEPT MY RULING AND MY LANGUAGE AND MY ORDER AND FIND THAT AS THE BASIS OF APPEAL AS OPPOSED TO REFRAMING THE ISSUE IN ANY PARTICULAR WAY.

MR. PFEIFFER: YOUR HONOR, LET ME BE CLEAR, I THINK WE ARE. WE HAVE NO DESIRE TO DO ANYTHING OTHER THAN TO ACCURATELY REPRESENT WHAT THE RULING SAYS AND WHAT WE BELIEVE TO BE THE RAMIFICATIONS OF THE RULING.

AND THE PARTICULAR PHRASING OF THAT IS, FRANKLY, A LOT LESS IMPORTANT TO US THAN GETTING THOSE ISSUES CERTIFIED FOR APPEAL.

AGAIN, I APOLOGIZE IF YOUR HONOR FEELS THAT WE HAVE MISCHARACTERIZED YOUR HOLDING. THAT IS NOT OUR INTENT, AND IT WOULD NOT BE OUR INTENT TO DO AT ANY POINT.

AND WE HAVE ATTEMPTED TO QUOTE AND OBVIOUSLY WOULD BE PROVIDING THE COURT OF APPEALS WITH YOUR OPINION AND QUOTING TO IT THROUGHOUT.

THAT'S REALLY OUR ISSUE, YOUR HONOR.

AND IF WE HAVE CHARACTERIZED THINGS IN A

PARTICULAR WAY, AGAIN, IT'S NOT OUR INTENT AT ALL TO MISCHARACTERIZE THE COURT'S RULING AND IT IS THE ULTIMATE -- THE COURT'S ULTIMATE RULING OF DECIDING THAT THESE ARE AFTERMARKET CLAIMS THAT CAN AT THIS POINT SURVIVE THAT WE WANT THE NINTH CIRCUIT TO REVIEW.

SO WE'RE OBVIOUSLY FULLY PREPARED TO TREAT THE LANGUAGE, THE FRAMING OF THIS AS APPROPRIATE TO GET THE ISSUE REVIEWED AND GET THE GUIDANCE OF THE NINTH CIRCUIT.

THE COURT: WELL, NEWCAL IS A NINTH CIRCUIT OPINION SO DO I UNDERSTAND THAT YOU BELIEVE THAT THE CIRCUIT HAS NOT -- DID NOT SPEAK CLEARLY IN NEWCAL?

MR. PFEIFFER: WELL, YOUR HONOR, AGAIN, AND LET ME BE CLEAR BECAUSE I THINK THERE IS SOME SUGGESTION FROM THE PLAINTIFFS HERE THAT WHAT WE'RE ASKING THIS COURT TO DO OR WHAT WE'RE ASKING THE NINTH CIRCUIT TO DO IS TO REVISIT ICON.

AND THIS MOTION, APPLE'S MOTION, IS NOT A MOTION FOR RECONSIDERATION. WE'RE NOT ASKING YOU TO RECONSIDER YOUR ORDER. WE'RE NOT ASKING YOU TO OBVIOUSLY RECONSIDER ICON.

WHAT WE'RE SAYING IS THAT -- AND OBVIOUSLY IT WOULD NOT BE OUR BURDEN EITHER UNDER

1292(B) TO TELL THE COURT YOU MUST DECIDE YOU'RE WRONG OR YOU MUST DECIDE THAT ICON IS WRONG.

WHAT WE'RE SAYING IS THAT THE APPLICATION OF ICON TO THESE CIRCUMSTANCES IS A VERY UNSETTLED PROSPECT, AND WE BELIEVE THAT THE NINTH CIRCUIT IF IT HAD A CHANCE TO LOOK AT IT WOULD NOT WANT ICON APPLIED AS EXPANSIVELY AS IT HAS BEEN IN THIS CASE.

AS JUST ONE PARTICULAR EXAMPLE OF THAT, YOUR HONOR, I THINK WHAT HAS BEEN SET UP BY THE PLAINTIFFS AND CERTAINLY THE WAY THAT I THINK THEY'RE URGING INTERPRETATION OF ICON AND OUR INTERPRETATION OF WHAT THE COURT DID IN YOUR ORDER IS YOU HAVE SET UP EFFECTIVELY A SUBJECTIVE TEST FOR CONSUMER AWARENESS.

WE BELIEVE THAT ICON DID DEAL WITH THAT ISSUE. IT -- ALTHOUGH ICON USED THE LANGUAGE OF KNOWINGLY AND VOLUNTARILY PLACING THE DEFENDANT IN A MONOPOLY POSITION, IT DIDN'T LIMIT ITSELF TO THAT AS A SUBJECTIVE TEST.

IT VERY SPECIFICALLY SAID AFTERMARKET CLAIMS WOULD FAIL IF A REASONABLE PERSON COULD HAVE DISCOVERED THE INFORMATION, AN OBJECTIVE REASONABLE PERSON TEST. THAT'S WHAT WE FEEL HAS BEEN LOST IN THE ORDER AND THAT'S THE ISSUE THAT WE THINK CLARITY FROM THE COURT OF APPEALS WOULD HELP.

AGAIN, WE DON'T THINK THAT'S A CHANGE IN ICON. WE DON'T THINK THAT'S SOMETHING MISSING FROM ICON, BUT WE BELIEVE IT IS AN UNSETTLED ISSUE AND IT HASN'T BEEN EXPRESSLY DEALT WITH IN ANY OTHER CASE THAT WE'RE AWARE OF TREATMENT AS A PURELY SUBJECTIVE TEST.

GUIDANCE ON THAT WOULD NOT JUST HELP THIS CASE, BUT IT WOULD APPLY MUCH MORE BROADLY. THERE ARE -- THERE IS OBVIOUSLY A REBIRTH OF AFTERMARKET LITIGATION IN THE COUNTRY, YOUR HONOR.

I BROUGHT JUST AS AN EXEMPLAR THE MATERIALS FROM THE ABA ANTITRUST SECTION SPRING MEETING COMING UP IN MARCH WHICH HAS A PANEL DEVOTED SOLELY TO WHAT IT CALLS THE LEGACY OF KODAK, AFTERMARKETS AND TYING.

THIS IS VERY MUCH A LIVE ISSUE, AND THE NOTION THAT AFTERMARKETS COULD BE FRAMED BY A SUBJECTIVE TEST OF WHAT THE PLAINTIFFS, THE CUSTOMERS' INTENT WAS, REGARDLESS OF WHAT DISCLOSURES WERE MADE TO THEM, WHAT A REASONABLE PERSON WOULD HAVE DONE WITH THOSE DISCLOSURES OR INFORMATION THAT WAS AVAILABLE TO THEM, WE BELIEVE THAT THAT IS IMPORTANT INFORMATION FOR THE WHOLE INDUSTRY AND OBVIOUSLY WOULD BE OUTCOME DETERMINATIVE IN THIS CASE.

THE COURT: WELL, I GUESS I'LL THINK ABOUT THIS SUBJECTIVE-OBJECTIVE DISTINCTION THAT YOU'RE MAKING.

YOU READ MY ORDER AS SAYING IT'S PURELY A SUBJECTIVE DECISION?

MR. PFEIFFER: THAT A PURELY SUBJECTIVE STATE WOULD SUFFICE, YOUR HONOR, I GUESS WOULD BE A MORE ACCURATE CHARACTERIZATION, YES.

AND WE BELIEVE THAT --

THE COURT: BUT YOU WOULD BE FORCED UNDER THESE CIRCUMSTANCES TO ACCEPT THE ALLEGATIONS OF THE COMPLAINT AS PROVABLE, AND YOU HAVE CARRIED THAT, YOU CARRY THAT WITH YOU TO THE CIRCUIT IF I ALLOW THE CASE TO GO UP ON APPEAL?

MR. PFEIFFER: NO QUESTION WE HAVE TO TAKE THE ALLEGATIONS OF THE COMPLAINT AS TRUE, TOGETHER WITH JUDICIALLY NOTICEABLE MATERIALS.

BUT, YES, YOUR HONOR.

THE COURT: WELL, IS IT OBJECTIVE OR SUBJECTIVE TO AGREE TO A LONGER THAN A TWO YEAR -- TO AGREE TO A TWO YEAR, NOT KNOWING AT THAT POINT THAT YOU'RE SUBJECT TO FIVE YEARS?

DOES THAT REQUIRE A SUBJECTIVE JUDGMENT OR IS THAT -- THAT'S NO JUDGMENT AT ALL BECAUSE YOU'RE BEING DEPRIVED OF JUDGMENT?

MR. PFEIFFER: WELL, YOUR HONOR, I UNDERSTAND. I THINK THE DISTINCTION THAT I'M TRYING TO DRAW OCCURS AT A DIFFERENT POINT.

THE ISSUE IS WAS THERE ENOUGH INFORMATION OUT THERE THAT A REASONABLE PERSON COULD NOT HAVE DISCOVERED THAT THE TERM WAS NOT TWO YEARS BUT WAS, IN FACT, FIVE YEARS?

THAT'S THE ISSUE, AND THAT'S THE WAY THAT ICON FRAMES IT.

THE COURT: "OUT THERE" MEANING TO COME FROM SOMEPLACE ELSE?

MR. PFEIFFER: EXACTLY RIGHT. THAT THERE IS NO REQUIREMENT OF APPLE HAVING IN ITS STORES A GREAT BIG SIGN THAT SAYS, HEY, IT'S FIVE YEARS, GUYS.

IF THE INFORMATION IS OUT THERE IN THE PUBLIC, THAT FITS THE ICON OBJECTIVE TEST OF COULD A REASONABLE PERSON HAVE DISCOVERED IT?

THE COURT: HOW KNOWN DOES IT HAVE TO BE TO BE "OUT THERE" IN YOUR ARGUMENT?

MR. PFEIFFER: WELL, YOUR HONOR, THAT'S NOT AN ISSUE WE HAVE GOTTEN A CHANCE TO BRIEF.

MY TAKE ON IT, YOUR HONOR, IS THAT IT WOULD BE SIMILAR TO A STATUTE OF LIMITATIONS THAT IF IT'S AN INQUIRY NOTICE, I THINK A REASONABLE

PERSON IS ON INQUIRY NOTICE WHEN THE INFORMATION IS AVAILABLE IN THE PUBLIC.

I THINK THIS IS A PARTICULARLY INTERESTING SITUATION, YOUR HONOR, BECAUSE THIS IS NOT LIKE A KODAK COPIER, WHICH IS SORT OF NOT OF A PARTICULAR INTEREST TO ANYONE OTHER THAN PERHAPS PURCHASING PEOPLE.

THE I-PHONE -- I DON'T WANT TO SAY --

THE COURT: DO YOU THINK IF IT WAS EQUALLY OUT THERE IN THE PUBLIC DOMAIN THAT IF YOU BOUGHT A CELL PHONE AT SOME POINT WHEN YOUR SERVICE CONTRACT EXPIRED YOU COULD SWITCH TO A DIFFERENT PROVIDER?

AND YOU THINK IT WAS OUT THERE THAT YOU COULD PUT DIFFERENT SIMM CARDS IN THEM TO USE THEM IN DIFFERENT WAYS IN DIFFERENT COUNTRIES AS MUCH AS IT WAS OUT THERE THAT PERHAPS THEY WERE LOCKED INTO AN APPLE AT & T CIRCUMSTANCE?

MR. PFEIFFER: NO, YOUR HONOR. AND TWO REASONS WHY THAT IS SO.

ONE IS THAT OBVIOUSLY THE RULE OF THE GENERAL DOES NOT TRUMP THE SPECIFIC WOULD APPLY HERE.

THERE WAS APPLE SPECIFIC INFORMATION ABOUT WHAT APPLE'S POLICIES WERE. IF THAT RULE

THAT YOU ANNOUNCED WERE THE CASE, THEN PARTIES COULD NEVER COME INTO A MARKET, THIS TIES TO THE INITIAL ENTRY STRATEGY, YOUR HONOR. PARTIES COULD NEVER COME INTO THE MARKET WITH A DIFFERENT STRATEGY THAN COMPETITORS DID.

WE CAME INTO A VERY COMPETITIVE MARKETPLACE. PARTIES HAD DIFFERENT PRACTICES WITHIN THAT MARKETPLACE. APPLE ADOPTED ITS OWN STRATEGY. THAT STRATEGY BECAME KNOWN PRIOR TO THE FIRST I-PHONE BEING SOLD AND THAT'S THE POINT.

THIS INFORMATION WAS RABIDLY DISCUSSED. THIS, AGAIN, IS NOT PEOPLE BUYING PRINTERS. THERE WAS FORUMS AND THIS WAS IN THE MAINSTREAM PRESS AND THIS WAS NOT HIDDEN INFORMATION, NOT INFORMATION WE COULD HAVE HIDDEN IF WE WANTED TO.

THE COURT: WHAT ABOUT THE REST OF THE LAWSUIT WHILE I ALLOW THIS? AS I UNDERSTAND THE PROCESS, THE CIRCUIT WOULD HAVE TO AGREE TO ACCEPT THIS.

MR. PFEIFFER: YES, YOUR HONOR.

THE COURT: AND IF THEY DON'T ACCEPT IT THEN WE'RE BACK HERE.

IF THEY DO ACCEPT IT, WHILE DURING THE PERIOD OF TIME THAT THEY'RE CONSIDERING IT, I SUPPOSE I COULD GO AHEAD WITH THE CASE, BECAUSE THE

RULE DOES SPEAK TO NO STAY AUTOMATICALLY BEING GRANTED, I WOULD HAVE THE DISCRETION TO KEEP GOING. BUT WHAT IF THEY ACCEPT THE QUESTION, WOULD THE REST OF THE CASE HAVE TO BE STAYED?

MR. PFEIFFER: YOUR HONOR, I THINK "HAVE TO" IS PROBABLY A BIT STRONG.

I THINK OUR VIEW, WE HAVE NOT DISCUSSED THIS IN DETAIL, BUT OUR VIEW I THINK WOULD BE THAT IT WOULD MAKE SENSE, THAT IT WOULD BE THE MOST EFFICIENT COURSE TO STAY THE CASE, BUT, NO, IT WOULDN'T HAVE TO BE.

I THINK IF THE ANTITRUST CLAIMS WERE BEING REVIEWED, SUBJECT AGAIN TO IF YOUR ORDER WERE CERTIFIED FOR APPEAL, IT IS CERTAINLY CONCEIVABLE THAT THE PARTIES COULD PROCEED TO THINGS LIKE THE BRICKING CLAIMS, THE COMPUTER --

THE COURT: BUT NOT THE ANTITRUST?

MR. PFEIFFER: NO, YOUR HONOR. ESPECIALLY THE WAY YOU'RE TALKING ABOUT IT, I THINK THE ISSUES WOULD BE WRAPPED UP IN ANY APPEAL, HOWEVER FRAMED, IT WOULD BE BROAD ENOUGH, THAT IT WOULDN'T MAKE SENSE TO GO FORWARD WITH THE ANTITRUST CLAIMS.

THE COURT: VERY WELL. LET'S HEAR FROM YOUR OPPONENT.

MR. PFEIFFER: THANK YOU, YOUR HONOR.

MR. RIFKIN: GOOD MORNING, MAY IT PLEASE THE COURT, MARK RIFKIN ON BEHALF OF THE PLAINTIFFS.

WE DO CERTAINLY AGREE WITH THE COURT THAT THE WAY THAT APPLE HAS PHRASED THESE QUESTIONS THAT IT INTENDS TO ADVANCE ON APPEAL SUGGESTS AN OUTCOME THAT WE THINK IS BOTH INCONSISTENT WITH THE COURT'S DECISION AND UNSUPPORTED BY THE LAW.

SO WE DON'T THINK THE COURT -- NUMBER ONE, WE CERTAINLY DON'T THINK THE COURT IS REQUIRED TO, NOR DO WE THINK THAT THE COURT SHOULD CERTIFY THESE SPECIFIC QUESTIONS FOR APPEAL.

BUT MORE IMPORTANTLY, WE THINK THAT THE QUESTIONS DEMONSTRATE APPLE'S INTERPRETATION OF BOTH THE COURT'S ORDER AND ITS INTERPRETATION OF THE LAW WHICH WE THINK IN THE CIRCUMSTANCES THAT WE HAVE ADDRESSED IN THE BRIEF MAKE IT PRETTY CLEAR THAT AN INTERLOCUTORY APPEAL IS NOT WARRANTED HERE.

AND I WILL BRIEFLY TRY TO EXPLAIN THIS ISSUE. AND I'LL NOTE THAT THE DISCUSSION THAT ENSUED WITH COUNSEL FOR APPLE ABOUT THIS DISTINCTION BETWEEN SUBJECTIVE AND OBJECTIVE IS AN INTERESTING ONE BECAUSE APPLE SEEMS NOW TO BE INSISTING THAT THE DETERMINATION HAS TO BE AN OBJECTIVE ONE BUT THE PLAINTIFFS ARE MAKING IT A

SUBJECTIVE ONE.

I SAY IT'S INTERESTING BECAUSE IT ARISES IN THE CONTEXT OF THE OTHER MOTIONS THAT ARE PENDING, WHICH THE COURT HAS DECIDED TO HEAR ON SUBMISSION AND THAT'S AT & T'S MOTIONS, THEY HAVE MOVED TO DISMISS AND THEY'VE ALSO MOVED TO STRIKE THE CLASS ALLEGATIONS.

AND IN SUPPORT OF THEIR MOTIONS TO STRIKE THE CLASS ALLEGATIONS, AT & T SAYS THAT THE PLAINTIFFS INSIST UPON A SUBJECTIVE DETERMINATION OF WHAT THE PLAINTIFFS AND THE CLASS MEMBERS KNEW SO THAT THE DEFENDANTS WOULD NEED TO DEPOSE EACH AND EVERY CLASS MEMBER ON THIS QUESTION OF WHAT THEY KNEW.

AND SO INTERESTINGLY NOW WE HAVE A POSITION WHERE APPLE IS SAYING ONE THING AND AT & T IS SAYING THE OTHER.

I, FRANKLY, THINK NEITHER ONE OF THOSE ARGUMENTS IS RIGHT, AND LET ME VERY BRIEFLY EXPLAIN WHY.

IN NEWCAL WHICH, YOUR HONOR, I SUBMIT IS CLEAR, IT'S PRECISE, IT IS REASONABLY ARTICULATED AND IT HAS PROVIDED AN ADEQUATE GUIDELINE FOR THE COURT'S DECISION.

IN NEWCAL THE COURT DECIDED THAT THE WAY

TO RECONCILE THE KODAK CASE, THE SUPREME COURT DECISION IN KODAK WITH THE TWO CIRCUIT COURT DECISIONS, THE THIRD CIRCUIT'S DECISION IN THE PIZZA CASE, IN THE DOMINOS PIZZA CASE AND THE NINTH CIRCUIT'S PRIOR CASE IN THE HUMANA HOSPITAL CASE WAS TO SAY THAT THE TWO CASES BY THE CIRCUIT COURTS, WHERE AFTERMARKET CLAIMS WERE NOT ALLOWED, THE PLAINTIFFS IN THOSE CASES, IN FACT, AGREED TO THE LIMITATIONS THAT WERE ATTACKED IN THE CASES.

AND SO THE COURT SAID -- AND I'M NOW GOING TO READ DIRECTLY FROM THE NINTH CIRCUIT'S DECISION IN NEWCAL, "THREE RELEVANT PRINCIPLES EMERGE. FIRST THE LAW PERMITS AN ANTITRUST CLAIMANT TO RESTRICT THE RELEVANT MARKET TO A SINGLE BRAND OF THE PRODUCT AT ISSUE AS IN EASTMAN KODAK."

WE HAVE DONE EXACTLY THAT. WE HAVE RESTRICTED THE MARKET, THE AFTERMARKET FOR SERVICE VOICE AND DATA SERVICE TO THE I-PHONE VOICE AND DATA SERVICE.

"SECOND, THE LAW PROHIBITS AN ANTITRUST CLAIMANT FROM RESTING ON MARKET POWER THAT ARISES SOLELY FROM CONTRACTUAL RIGHTS THAT CONSUMERS KNOWINGLY AND VOLUNTARILY GAVE TO THE DEFENDANT, AS IN QUEEN CITY PIZZA AND FORESITE."

NOW, IN THE QUEEN CITY PIZZA AND FORESIGHT THE COURT HAD IN FRONT OF IT A WRITTEN CONTRACT. THE COURT HERE HAS IN FRONT OF IT HAS A WRITTEN CONTRACT.

IN THE ONE INSTANCE APPLE WANTS TO SAY THAT THE WRITTEN CONTRACT DOESN'T MATTER BECAUSE THERE WAS -- THERE WERE BLOGS, THERE WERE MESSAGE BOARDS AND THERE WAS MAINSTREAM PRESS THAT TOLD THE PLAINTIFFS THAT WHAT THE WRITTEN CONTRACT SAYS WASN'T ACTUALLY WHAT THE PARTIES AGREED TO.

WELL, WE SAY THAT'S RIDICULOUS. AND WE SAY IT'S RIDICULOUS FOR A NUMBER OF REASONS, NOT THE LEAST OF WHICH IS THE WRITTEN CONTRACT ITSELF.

AND WE BROUGHT THIS TO THE ATTENTION OF THE COURT IN RESPONDING TO AT & T'S MOTION BUT LET ME SIMPLY READ WHAT THAT CONTRACT SAYS.

"THE TWO-YEAR SERVICE AGREEMENT THAT EVERY MEMBER OF THE CLASS SIGNED PROVIDES THAT THE TERM OF THE AGREEMENT IS TWO YEARS AND IT PROVIDES THAT IT CAN BE TERMINATED AT ANY TIME."

IT ALSO SAYS, "THAT THIS AGREEMENT AND THE ACCOMPANYING DOCUMENTS MAKE UP THE COMPLETE AGREEMENT BETWEEN YOU AND AT & T AND SUPERSEDE ANY AND ALL PRIOR AGREEMENTS AND UNDERSTANDINGS BETWEEN THE PARTIES."

IT IS FOLLY FOR APPLE AND AT & T TO SUGGEST THAT SOME CONSUMER SOMEWHERE SHOULD HAVE KNOWN SOMETHING THAT WAS PUBLISHED BEFORE THEY ENTERED INTO THAT CONTRACT THAT WAS INCONSISTENT WITH THE TWO-YEAR TERM OF THE CONTRACT BUT NONETHELESS THEY AGREE TO BE BOUND, THE CONSUMERS AGREE TO BE BOUND BY THOSE PRIOR INCONSISTENT STATEMENTS.

THE COURT: WELL, IS IT THAT THEY AGREED TO BE BOUND OR AS A MATTER OF PRACTICALITY THEY WOULD BE BOUND?

PART OF WHAT I CAME TO AS I WAS THINKING ABOUT WHETHER TO CERTIFY THIS IS THE COMBINATION OF THE CONTRACTUAL LANGUAGE, WHICH I AGREE WITH YOU ON ITS FACE IS TWO YEARS. AT THE END OF THAT TWO YEARS, THERE'S A DETERMINATION.

THERE'S NOTHING THAT WOULD REQUIRE -- THERE'S NO CONTRACTUAL REQUIREMENT THAT THE PURCHASER OF THE PHONE NOW CONTINUED TO SUBSCRIBE BEYOND THAT TWO YEARS. THEY HAVE NOT GIVEN UP THAT.

I GUESS THEIR ALTERNATIVE WOULD BE TO SIMPLY BUY ANOTHER PHONE OR TO TOSS THE I-PHONE AND GO OUT AND DO SOMETHING ELSE.

IT'S ONLY THE PRACTICAL PROBLEM THAT THE

THE PHONE IS AN INSTRUMENT THAT LASTS NORMALLY LONGER THAN TWO YEARS --

MR. RIFKIN: RIGHT.

THE COURT: -- THAT CREATES THE AFTERMARKET.

AND WHAT I NEED TO DO IS TO DECIDE IF THERE'S ANY BENEFIT TO ALLOWING THE CIRCUIT COURT IN THE MIDDLE OF THIS CASE TO REVIEW THE QUESTION OF WHETHER OR NOT THERE'S A COGNIZABLE ANTITRUST CLAIM THAT CAN BE STATED UNDER THOSE CIRCUMSTANCES BECAUSE THERE IS NO SECRET CONTRACT. IT'S JUST A TECHNOLOGY THAT KICKS IN AT THE POINT WHERE THE CONTRACT IS OVER, WHICH AS A PRACTICAL MATTER BINDS THE CONSUMER IF THEY WANT TO GET FURTHER BENEFIT OUT OF THEIR PHONE TO SIGN UP AGAIN.

MR. RIFKIN: RESPECTFULLY, YOUR HONOR, THAT IS EXACTLY THE QUESTION AND IT IS EXACTLY THE QUESTION THAT WAS IN FRONT OF THE NINTH CIRCUIT IN NEWCAL, AND IT'S EXACTLY THE QUESTION THAT THE COURT SAID NO TO IN NEWCAL.

AND LET ME EXPLAIN.

THERE WERE CONTRACTUAL RELATIONSHIPS BETWEEN THE PLAINTIFFS IN NEWCAL AND THE DEFENDANT.

AND AT SOME POINT IN TIME ICON DECIDED TO AMEND THOSE CONTRACTS. AND THE PLAINTIFF ALLEGED

THAT ICON DID SO WITHOUT DISCLOSING THAT THE AMENDMENTS WOULD LENGTHEN THE TERM OF THEIR ORIGINAL AGREEMENT.

THAT'S NO DIFFERENT THAN THE SITUATION WE HAVE HERE. THERE WAS AN ORIGINAL AGREEMENT BETWEEN EVERY PLAINTIFF, EVERY CLASS MEMBER, AND AT & T. TWO YEARS. NO QUESTION ABOUT IT.

APPLE AND AT & T HAD THEIR OWN AGREEMENT THAT WAS DIFFERENT THAN THE AGREEMENT BETWEEN THE PLAINTIFFS AND CLASS MEMBERS AND AT & T.

AND AT SOME POINT IN TIME AT & T WAS GOING TO HAVE TO AMEND THOSE AGREEMENTS TO ENFORCE THE FIVE-YEAR DEAL IT HAS WITH APPLE. IT'S EXACTLY THE SAME.

THE COURT: I UNDERSTAND YOUR POSITION.

ISN'T THIS THE LAWSUIT -- ISN'T THIS LEGAL ISSUE WHAT IS THE ISSUE THAT WILL DECIDE THIS CASE ONE WAY OR THE OTHER?

WOULDN'T WE ALL BENEFIT FROM SAYING LET'S JUST CERTIFY THIS ISSUE? IF THE PLAINTIFF IS SUCCESSFUL IN STATING A CLAIM, THIS BECOMES A DAMAGES CASE AND LET'S MOVE TO DAMAGES.

IF THE PLAINTIFF IS UNSUCCESSFUL IN STATING A CLAIM, THE CASE IS GOING TO GO AWAY. WHY NOT LOOK AT THE REALITIES OF LITIGATION.

MOST CASES SETTLE. THIS CASE, LIKE MOST, CAN BE RESOLVED, BUT THE THING THAT IS GOING TO DIVIDE US FOR THE LIFE OF THE CASE WILL BE THAT ULTIMATE LEGAL ISSUE.

WHY NOT GET IT OVER WITH RIGHT NOW IF THE CIRCUIT WILL ANSWER?

NOW, IF THE CIRCUIT WON'T ANSWER, THEY CAN CERTAINLY REJECT THIS REQUEST, THEN WE TAKE THE NORMAL COURSE.

BUT IF THE CIRCUIT ACCEPTS IT, THAT COULD BE A BENEFIT FOR ALL OF US.

NOW, I DO HAVE THE QUESTION OF WHAT HAPPENS WITH THE REST OF THE CASE, BUT IT SEEMS TO ME THAT THE REST OF THE CASE WILL ALSO BE AFFECTED BY THAT DECISION. AT & T WILL BE PULLED INTO THE SAME WHIRLPOOL OF SYNERGY THAT BECOMES THE LAW OF THE CASE.

MR. RIFKIN: WELL, IT DOESN'T RESOLVE ALL OF THE CASE, AND WE EXPLAINED IN OUR RESPONSE TO APPLE'S MOTION THAT IT LEAVES COMPLETELY UNRESOLVED.

IT LEAVES THE I-PHONE APPLICATIONS AFTERMARKET CLAIM COMPLETELY UNRESOLVED.

THERE'S NEVER BEEN ANY ARGUMENT ADVANCED THAT ANY ONE AT ANY POINT IN TIME KNEW WHAT APPLE

PRACTICES WERE GOING TO BE WITH RESPECT TO THE APPLICATIONS.

SO IF APPLE SAYS THAT CONSUMERS MUST HAVE KNOWN AND SHOULD BE CHARGED WITH KNOWING ABOUT ITS INTENT TO MONOPOLIZE THE SERVICE MARKET FOR FIVE YEARS, THAT HAS NOTHING TO DO WITH THEIR INSISTENCE THAT APPLICATIONS BE RESTRICTED ONLY TO PEOPLE WHO DID BUSINESS WITH APPLE. THAT'S NUMBER ONE.

NUMBER TWO, IT DOES NOTHING WITH RESPECT TO THE MAGNUSON-MOSS WARRANTY ACT CLAIM.

IT DOES ABSOLUTELY NOTHING WITH RESPECT TO THE CONSUMER TRESPASS CLAIM.

IT DOES ABSOLUTELY NOTHING WITH RESPECT TO THE CONSUMER FRAUD CLAIM.

THERE ARE LARGE PARTS OF THIS CASE, INCLUDING AN ANTITRUST CLAIM THAT ARE COMPLETELY UNRESOLVED BY THIS APPEAL.

AND WHEN WE SAID THAT, APPLE REPLIED THAT IT DOESN'T HAVE TO RESOLVE ALL OF THE ISSUES IN THE CASE FOR IT TO BE A CONTROLLING QUESTION.

WELL, APPLE MISSED THE POINT.

THE POINT IS THAT THIS CASE IS GOING TO PROCEED, LIKE IT OR NOT, NO MATTER WHAT THE COURT DOES WITH THIS MOTION, NO MATTER WHAT THE NINTH CIRCUIT DOES WITH THIS MOTION.

NOW, I SUBMIT THAT APPLE HAS NOT MET THE STANDARDS FOR AN INTERLOCUTORY APPEAL.

WE HAVE EXPLAINED THAT IN OUR BRIEFS, AND I DON'T WANT TO BELABOR THAT POINT.

BUT THERE'S NO FUNDAMENTAL DIFFERENCE OF OPINION HERE.

WHAT APPLE REALLY WANTS TO DO IS THAT THEY WANT TO RESHAPE THE LAW THAT THE NINTH CIRCUIT JUST LAID OUT IN NEWCAL IN 2008. THE INK IS BARELY DRY ON THAT OPINION AND APPLE WANTS TO GO BACK AND THEY WANT TO RELITIGATE THAT ISSUE IN THE NINTH CIRCUIT.

THE NINTH CIRCUIT DECIDED THESE ISSUES EXACTLY.

YOU CAN SUBSTITUTE THE NAMES OF THE PARTIES IN THAT CASE FOR THE NAMES OF THE PARTIES IN THIS CASE, AND THE RESULT IS ABSOLUTELY IDENTICALLY THE SAME.

THE COURT: WELL, IT'S DIFFERENT IN ONE RESPECT. IN NEWCAL THERE WAS AN AMENDMENT TO THE CONTRACT, AND SO IT DID DERIVE FROM A CONTRACTUAL CHANGE.

HERE THE ANTICOMPETITIVE BEHAVIOR DERIVES FROM SOMETHING THAT APPLE AND AT & T AGREED TO, BUT IT WASN'T FOLDED INTO THE CONTRACTUAL RELATIONSHIP

WITH THE CONSUMER.

ULTIMATELY A CONSUMER WOULD BE AFFECTED BY IT, AND THAT'S WHAT I THINK IS A FAIR EXTENSION AS I SAID IN MY ORDER. BUT IT WAS AN EXTENSION.

I DON'T THINK THAT IT'S -- WELL, I'LL THINK ABOUT THIS.

MR. RIFKIN: YOUR HONOR, THE PRINCIPLE IN NEWCAL THAT REALLY MATTERS IS THIS: AN ANTITRUST PLAINTIFF CANNOT COMPLAIN ABOUT BEING LOCKED INTO AFTERMARKET FOR A PRODUCT WHICH HAS ANTICOMPETITIVE IMPACT.

A CONSUMER CANNOT COMPLAIN ABOUT BEING LOCKED INTO AN AFTERMARKET FOR PRODUCT IF THE CONSUMER DELIBERATELY AND KNOWINGLY CHOOSES TO BE LOCKED IN. THAT'S THE REASON THAT NEWCAL WAS DECIDED THE WAY IT WAS DECIDED.

IN NEWCAL THE COURT SAID THE PLAINTIFF DID NOT AGREE TO THAT.

IN KODAK THE SUPREME COURT SAID THE PLAINTIFF DID NOT AGREE TO THAT.

IN THE HUMANA HOSPITAL CASE AND IN THE DOMINOS PIZZA CASE THE NINTH CIRCUIT AND THE THIRD CIRCUIT SAID THE PLAINTIFFS HAD AGREED TO BE BOUND IN THE AFTERMARKET. A PLAINTIFF WHO AGREES TO BE BOUND IN THE AFTERMARKET CAN'T COMPLAIN ABOUT BEING

BOUND IN THE AFTERMARKET.

THERE IS NONE OF THAT HERE. THE --

THE COURT: LET ME ASK IT THIS WAY, AND I HAVE ASKED IT IN A DIFFERENT WAY, BUT LET ME ASK IT THIS WAY: I PRESUME THAT THERE WILL BE A HEARING BEFORE THE CIRCUIT OR BRIEFING. I HAVE NEVER DONE THIS, QUITE FRANKLY, OR IF I HAVE, I HAVEN'T DONE IT FREQUENTLY ENOUGH TO REMEMBER.

I OFTEN THINK THAT THE CIRCUIT JUDGES WOULD PREFER TO HAVE CASES ON A FULL RECORD, BUT THIS RULE EXISTS IN THOSE INSTANCES WHERE THERE IS SOME LEGAL ISSUE WHICH CAN -- IT'S PIVOTAL IN A CASE.

NOW, YOU'RE GOING TO MAKE AN ARGUMENT BEFORE THE CIRCUIT THAT THEY SHOULD NOT CERTIFY THE APPEAL FOR THE SAME REASONS THAT YOU'RE MAKING HERE.

SO IF YOU'RE SUCCESSFUL, I'LL GET THE CASE BACK. IF YOU LOSE, IT MEANS THAT THE CIRCUIT SEES SOMETHING WHICH IT WANTS TO TAKE A LOOK AT.

THE REASON THAT I'M -- THE REASON I ASK THE QUESTION WOULDN'T WE ALL BENEFIT, BECAUSE IT REDOUNDS TO YOUR BENEFIT AS WELL AS TO APPLE'S TO HAVE THIS QUESTION ANSWERED.

I'VE GIVEN YOU MY VIEW ON IT, AND SO I'LL

LOOK AGAIN AND DECIDE WHETHER OR NOT THERE IS A BASIS FOR ASKING THE NINTH CIRCUIT TO AT LEAST CONSIDER IT.

THEY MIGHT REJECT IT BECAUSE UNDER YOUR ARGUMENT THEY SHOULD REJECT IT BECAUSE THERE IS NO REASON TO TAKE IT.

AND IF THAT REJECTION COMES, IT WOULD SIGNAL THAT THIS IS A CASE THAT IS WITHIN THE CONFINES OF ICON AND NEWCAL, AND, THEREFORE, IT WOULD SET US ON A DIFFERENT PATH THAN IF THEY ACCEPTED THE CASE.

MR. RIFKIN: I DON'T WANT THE COURT TO LOSE SIGHT OF THE PRACTICAL CONCERNS THAT ARE IMPLICIT IN THE RULES. THE RULE CONTEMPLATES THAT THE DISTRICT COURT MAKES THE DETERMINATION IN THE FIRST INSTANCE BECAUSE --

THE COURT: OH, YES, I KNOW. I'M NOT PASSING THE TOTAL DECISION OVER TO THEM BUT THEY GET A VETO.

MR. RIFKIN: AND THIS IS THE PRACTICAL CONSIDERATION THAT IS REFLECTED IN THE RULE, IT MAY TAKE THE NINTH CIRCUIT 9 MONTHS, A YEAR, 15 MONTHS, A YEAR, 18 MONTHS TO GET AROUND TO DECIDING THIS ISSUE.

THE COURT: BUT I CAN KEEP THE CASE GOING

DURING THAT PERIOD OF TIME.

MR. RIFKIN: OF COURSE.

THE COURT: I WOULDN'T STAY THE CASE WHILE THE NINTH CIRCUIT IS CONSIDERING IT BECAUSE INDEED THAT WOULD BENEFIT US ALL BECAUSE YOUR BRIEFING AT A POINT WHERE THE DECISION WILL HAVE BEEN MADE WILL FLUSH OUT MORE ABOUT THE FACTS AND CIRCUMSTANCES, THE SO-CALLED "IT WAS OUT THERE" WILL BE BETTER FLUSHED OUT BY THAT POINT IN TIME.

MR. RIFKIN: WELL, LET'S NOT LOSE SIGHT OF THE FACT THAT THIS WAS A RULING ON A MOTION TO DISMISS.

THE COURT: YES.

MR. RIFKIN: AND HOW MUCH OF THE RECORD THE NINTH CIRCUIT WILL WANT TO CONSIDER IN DECIDING THE CORRECTNESS OF YOUR HONOR'S DECISION ON A MOTION TO DISMISS.

THE COURT: THAT'S A GOOD REMINDER. IT WILL ALWAYS COME BACK TO YOUR COMPLAINT, WOULDN'T IT?

MR. RIFKIN: RIGHT. AND I THINK THE COMPLAINT IS ABSOLUTELY CRYSTAL CLEAR. IT MEETS NEWCAL WHICH ITSELF WAS ABSOLUTELY CRYSTAL CLEAR.

AND I THINK APPLE JUST DOESN'T MEET THE THRESHOLD. IT MIGHT BE BETTER IN SOME COSMIC SENSE

OF THE WORD TO HAVE FINALITY AND CERTAINTY, ALTHOUGH I SUSPECT GIVEN THE WAY THIS CASE HAS PROCEEDED THAT EVEN THEN WE WON'T HAVE FINALITY AND CERTAINTY.

BUT I JUST DON'T THINK THAT APPLE MEETS ITS BURDEN UNDER THE RULE FOR THE COURT TO CERTIFY THIS TO THE NINTH CIRCUIT TO DECIDE IF THEY WANT TO HEAR IT.

ANYTHING FURTHER, YOUR HONOR?

THE COURT: NO THANK YOU.

MR. PFEIFFER: YOUR HONOR, MAY I BRIEFLY RESPOND?

THE COURT: CERTAINLY. BRIEFLY.

MR. PFEIFFER: THANK YOU, YOUR HONOR.

FIRST OF ALL, YOUR HONOR, JUST BECAUSE COUNSEL RAISED IT, THERE IS NO INCONSISTENCY BETWEEN THE POSITION THAT APPLE WAS TAKING IN ITS MOTION TO STRIKE AND OUR MOTION HERE.

BOTH TOOK YOUR ORDER AS SAYING THAT THERE WAS A SUBJECTIVE TEST. THAT'S WHY APPLE SAID THAT THEY NEEDED DISCOVERY OF THE SUBJECTIVE STATE OF MIND OF THE INDIVIDUAL PLAINTIFFS AND IT'S WHY WE WERE SAYING THIS ISSUE SHOULD BE RESOLVED TO SEE WHETHER IT IS, IN FACT, SUBJECTIVE OR OBJECTIVE.

THEY'RE ACTUALLY PERFECTLY CONSISTENT

POSITIONS.

ON THE DISTINCTION THAT COUNSEL WAS RAISING BETWEEN WHAT HAPPENED IN QUEEN CITY PIZZA AND KODAK, WHAT -- THE PROBLEM, AND I THINK YOUR HONOR ACTUALLY HIT ON IT, THERE IS A CONTRACT FOR A TWO-YEAR SERVICE AGREEMENT WITH AT & T.

AND WHAT THE PLAINTIFFS ARE TRYING TO SAY HERE, THOUGH, IS THAT THERE HAD TO BE A FURTHER CONTRACT TERM THAT SAID, AND BY THE WAY, YOU'LL HAVE TO RENEW AND USE YOUR PHONE WITH AT & T AFTER THAT.

IN FACT, THE CONTRACT IS COMPLETE. AT THE END OF TWO YEARS PEOPLE CAN STOP PAYING AT & T AND STOP TAKING THEIR SERVICE AND THE CONTRACT WILL END IF THEY DO NOTHING ELSE.

WHAT THE PLAINTIFFS ARE SAYING WAS NOT DISCLOSED IS THAT THE PHONE WILL ONLY WORK WITH AT & T SERVICE BEYOND PRESUMABLY, AT THIS POINT IT HASN'T HAPPENED YET, BUT BEYOND THAT TWO-YEAR PERIOD.

THAT'S THE ISSUE THAT IS SUPPOSED -- THAT THEY SAY NOBODY COULD HAVE --

THE COURT: WHAT DO YOU MEAN IT HASN'T HAPPENED YET? THERE IS AN AGREEMENT ALREADY IN PLACE WITH RESPECT TO THE POST TWO-YEAR PERIOD.

AND PART OF THE FACTS THAT YOU DON'T STATE IS THAT THE PHONE WON'T WORK AFTER TWO YEARS UNLESS THERE IS SERVICE.

MR. PFEIFFER: AND, AGAIN, YOUR HONOR, THAT'S THE QUESTION, COULD IT -- THAT'S THE ICON TEST WE BELIEVE IS WOULD A REASONABLE PERSON NOT HAVE BEEN ABLE TO DISCOVER THAT? WOULD IT HAVE NOT HAVE BEEN REASONABLY POSSIBLE TO DISCOVER THAT FACT?

BUT IT DOESN'T MEAN THAT THERE WAS A CONTRACT TERM THAT APPLIED AND WOULD HAVE TOLD PEOPLE OTHERWISE. THE CONTRACT SAID AFTER TWO YEARS YOU CAN STOP BUYING AT & T SERVICE.

THE COMPLAINT THE PLAINTIFFS HAVE IS THAT THE CONTRACT SIMPLY DIDN'T SPEAK TO THIS ISSUE.

THE COURT: WELL, IMPLICIT AFTER TWO YEARS "YOU CAN STOP BUYING AT & T SERVICE" IS AND "USE YOUR PHONE WITH SOME OTHER SERVICE."

MR. PFEIFFER: WELL, YOUR HONOR, I DON'T AGREE WITH THAT.

THE COURT: AH. HOW WOULD THE PHONE BE USEFUL AFTER TWO YEARS?

MR. PFEIFFER: AND IT MIGHT NOT BE. BUT THE POINT IS THAT --

THE COURT: EVERY TIME YOU STAND UP I GO

THE OTHER WAY. EVERY TIME HE STANDS UP I GO THE OTHER WAY. SO THIS IS A PERFECT SITUATION FOR ME TO THINK MORE ABOUT IT. THANK YOU VERY MUCH.

MR. SASSE: DAN SASSE FOR AT & T MOBILITY.

JUST TO MAKE IT EASIER FOR YOUR HONOR, WE DO AGREE WITH YOUR HONOR THAT IT WOULD BE FAR MORE EFFICIENT TO HAVE THE CIRCUIT TO CONSIDER THE QUESTION AT THIS POINT, AND WE WOULD ASK IF THE COURT IS INCLINED TO GO THAT WAY THAT YOU SEND US WITH APPLE.

THE COURT: YOU JOINED IN THIS?

MR. SASSE: WE DID NOT JOIN, YOUR HONOR, BECAUSE OUR MOTION TO DISMISS IS PENDING SEPARATELY.

THE COURT: SO I DON'T KNOW IF I SHOULD RECOGNIZE YOU ALTHOUGH YOU HAVE A VERY HANDSOME TIE.

MR. SASSE: THANK YOU, YOUR HONOR. BUT I THINK IT WOULD BE IMPORTANT FOR THE COURT TO RECOGNIZE THAT.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)